OCBC Securities (MELAKA) Sdn Bhd (formerly known as Sykt Tan, Chow & Loh Securities Sdn Bhd) v Koh Kee Huat

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–43 OF 2000
LOW HOP BING J
3 DECEMBER 2003

Contract — Duress — Economic Duress — Whether indemnity rendered voidable by economic duress — Contracts Act 1950 ss 15, 73

This is an appeal by the plaintiff against the decision of the learned sessions court judge dismissing the plaintiff's claim with costs. The plaintiff's claim against the defendant was for a sum of RM36,667.57 pursuant to an indemnity executed by the defendant in favour of the plaintiff. The defendant worked in the plaintiff company as a remisier from 1982 to 1991. He was required to deposit a sum of RM65,000 with the plaintiff. He resigned in April 1991 to join another securities company. The defendant requested for the release of the deposit to him. The deposit was released upon the defendant's execution of the indemnity, at the request of the plaintiff's director-cum-general manager. The defendant contended that the indemnity was signed as a result of economic duress. The issue here is whether the sessions court had correctly applied the law of economic duress to the specific facts set out above, having regard to ss 15 and 73 of the Contracts Act 1950.

Held, allowing the appeal with costs and setting aside the decision of the sessions court:

(1) Although s 15 does not provide for duress as a defence, in Malaysia the concept of duress and that of coercion have been used interchangeably. The facts of the case does not come within the ambit and purview of 'coercion' as defined in s 15 (see paras 13–14).

(2) From the authorities dealing with the concept of duress, the following principles may be distilled: (a) our courts are slow in invoking the concept of duress as defined in s 15 or to import the concept of economic duress unless there is positive evidence to that effect, which must satisfy the guidelines given by the Privy Council in *Pao On & Ors v Lou Yiu Long & Ors* (1980) AC 614; (b) the defence of duress or economic duress must be such so as to vitiate free consent in order to render the contract voidable; (c) the concept of coercion as defined in s 15 cannot be equated with that in s 73 in which the word 'coercion' should be given an ordinary and general meaning; and (d) s 73 requires a person to whom money has been paid under coercion to repay or return it (see para 25).

(3) On the facts as specifically found by the court below, there is nothing to indicate that the defendant has established any of the guidelines given in *Pao On*. The words purportedly uttered by the plaintiff's director-cum-general manager, even if accepted *in toto*, cannot constitute economic duress to render the indemnity voidable (see para 26).

(4) There was no allegation by the defendant that payment of the original deposit of RM65,000 to the plaintiff was paid as a result of the exertion of any economic duress by the plaintiff. Hence, the facts do not attract the application of s 73 (see para 27).

[**Bahasa Malaysia summary**

Ini merupakan rayuan plaintif terhadap keputusan hakim mahkamah sesyen, yang menolak tuntutan plaintif dengan kos. Tuntutan plaintif terhadap defendan adalah untuk mendapatkan sebanyak RM36,667.57 selaras dengan suatu indemniti yang dilaksanakan oleh defendan bagi manfaat plaintif. Defendan bekerja dalam syarikat plaintif sebagai remiser dari tahun 1982 hingga 1991. Beliau dikehendaki mendepositkan sebanyak RM65,000 dengan plaintif. Beliau meletakkan jawatan pada bulan April 1991 untuk bekerja dengan syarikat sekuriti yang lain. Defendan meminta supaya deposit berkenaan dilepaskan kepadanya. Deposit tersebut dilepaskan setelah defendan melaksanakan indemniti berkenaan dan itu dilakukan atas permintaan pengarah yang juga merupakan pengurus besar plaintif. Defendan menghujah bahawa indemniti berkenaan ditandatangani lantaran dures ekonomi. Isunya di sini ialah sama ada mahkamah sesyen telah memakai undang-undang tentang dures ekonomi itu dengan betul terhadap fakta-fakta khusus yang dibentangkan di atas setelah mengambil kira ss 15 dan 73 Akta Kontrak 1950.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan keputusan mahkamah sesyen:

(1) Meskipun s 15 tidak memperuntukkan dures sebagai suatu pembelaan, di Malaysia, konsep dures dan konsep paksaan telah digunakan saling bertukar ganti. Fakta-fakta kes berkenaan tidak terletak dalam batas dan skop 'paksaan' sebagaimana yang ditakrif di dalam s 15 (lihat perenggan-perenggan 13–14).

(2) Daripada autoriti-autoriti yang menangani konsep dures, prinsip-prinsip yang berikut boleh disari: (a) mahkamah-mahkamah kita memakan masa untuk menggunakan konsep dures seperti yang ditakrif di dalam s 15 atau untuk menggunakan konsep dures ekonomi kecuali jika terdapat keterangan yang positif yang mendatangkan kesan atau natijah sedemikian, dan ini mestilah memenuhi garis panduan yang diberi oleh Majlis Privi dalam kes *Pao On & Ors v Lou Yiu Long & Ors* [1980] AC 614; (b) dures atau dures ekonomi hanya boleh digunakan sebagai pembelaan jika ia merosakkan keizinan bebas bagi menjadikan kontrak berkenaan boleh batal; (c) konsep paksaan seperti yang ditakrif dalam s 15 tidak boleh disamakan dengan konsep yang terdapat dalam s 73 yang di dalamnya perkataan 'paksaan' hendaklah diberi makna biasa dan am; dan (d) s 73 menghendaki seseorang yang kepadanya wang telah dibayar di bawah paksaan supaya membayar balik atau mengembalikan wang berkenaan (lihat perenggan 25).

(3) Berdasarkan fakta-fakta seperti yang ditemui secara khusus oleh mahkamah bawahan, tidak terdapat apa-apa jua pun yang menunjukkan

bahawa defendan telah membuktikan mana-mana satu garis panduan yang diberi dalam kes *Pao On*. Perkataan yang kononnya diujarkan oleh pengarah merangkap pengurus besar plaintif itu, kalaulah diterima secara *in toto* sekalipun, tidak membentuk dures ekonomi yang menjadikan indemniti itu boleh batal (lihat perenggan 26).

(4) Tidak terdapat sebarang dakwaan oleh defendan bahawa bayaran deposit asal sebanyak RM65,000 kepada plaintif itu telah dibayar akibat tindakan plaintif mengenakan dures ekonomi. Justeru, fakta-fakta tersebut tidak menggamit pemakaian s 73 (lihat perenggan 27).]

Notes

For cases on economic duress, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3040–3042.

Cases referred to

Alec Lobb (Garages) Ltd & Ors v Total Oil GB Ltd [1983] 1 All ER 944 (refd)
Barton v Armstrong [1976] AC 104 Maskell v Homer [1915] 3 KB 106 (refd)
Chin Nam Bee Development Sdn Bhd v Tai Kim Choo & 4 Ors [1988] 2 MLJ 117 (refd)
Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal [1992] 2 MLJ 734 (refd)
Kanhaya Lai v National Bank of India Ltd [1913] ILR Vol XL (Calcutta series) 598 (refd)
Mohd Fariq Subramaniam v Naza Motor Trading Sdn Bhd [1998] 6 MLJ 193 (refd)
Occidental Worldwide Investment Corporation v Skibs A/S Avanti [1976] 1 Lloyd's Rep 293 (refd)
Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd [1993] 2 MLJ 224 (refd)
Pamaron Holdings Sdn Bhd v Ganda Holdings Bhd [1988] 3 MLJ 346 (refd)
Pao On & Ors v Lou Yiu Long & Ors [1980] AC 614 (folld)
Perlis Plantation Berhad v Mohamad Abdullah Ang [1988] 1 CLJ 670 (refd)
Schanka v Employment National (Administration) Pty Ltd and others [2000] 170 ALR 42 (refd)
Teck Guan Trading Sdn Bhd v Hydrotek Engineering Sdn Bhd & Ors [1996] 4 MLJ 331 (refd)
Third World Development Ltd and Anor v Atang Latief and Anor [1990] 1 MLJ 385 (refd)

Legislation referred to

Contracts Act 1950 ss 15, 73
Evidence Act 1950 ss 102, 103, 114(g), 134

Appeal from: Civil Suit No 52–646 of 1992 (Sessions Court, Melaka)

Shaari Nor (Shaari Nor & Co) for the defendant.
LK Tiu (Koh Kim Leng & Co) for the plaintiff.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the appellant-plaintiff ('the plaintiff') against the decision of the learned sessions court judge who on 27 July 2000 dismissed the plaintiff's claim with costs.

FACTS OF THE CASE

[2] The plaintiff's claim against the respondent-defendant ('the defendant') was for a sum of RM36,667.57 pursuant to an indemnity executed by the defendant on 19 April 1991 in favour of the plaintiff ('the indemnity') in the following terms:

> To M/s Sykt Tan Chow & Loh Securities Sdn Bhd, Malacca.
>
> Re : Indemnity
>
> IN CONSIDERATION of our agreement and the terms of employment as a Remisier with your company AND IN CONSIDERATION of your releasing me to join another Stockbroking Company and your releasing the deposit to me before ascertaining all the losses I am responsible for MR KOH KEE HUAT I the undersigned HEREBY AGREE AND CONFIRM to indemnify you and keep you indemnified against all losses, claims and actions arising out of all the transactions handled by me between my own clients and yourselves and the delivery of all shares by all my selling clients in the event that the scripts as delivered shall for any reason whatsoever turn out to be not good for delivery.
>
> AND I FURTHER AGREE that I shall pay for such losses, claims and/or judgment within 14 days of a notice of demand made on me and after such notice the sum so claimed shall be deemed to be a liquidated debt and may become actionable forthwith.
>
> The indemnity shall be continuing and shall be determined by the full payment of the sum or sums as demanded by you and shall be binding on myself and my personal representatives.
>
> Dated this 19 day of April 1991.
>
> Name : MR KOH KEE HUAT
>
> IC No : 5464297
>
> Address: 7222-C, 8 milestone
>
> Paya Rumput
>
> MELAKA
>
> WITNESS
>
> (TAN TIONG HOE)
>
> I/C: 0869587

[3] The defendant who served in the plaintiff company from 1982 to 1991 as a remisier was required to deposit a sum of RM65,000 with the

plaintiff. He resigned on 12 April 1991 in order to join another securities company, ie Street Securities Sdn Bhd for which he was required to deposit a sum of RM100,000. In order to meet this requirement, the defendant requested the plaintiff to release the deposit of RM65,000 to him, which was effected upon the defendant's execution of the indemnity, at the instance of the plaintiff's director-cum-general manager, one Latif bin Dato Tamby Chik ('Latif'), who told the defendant:

> The choice is yours. If you sign, you will get your money. If you don't sign, you won't get your money.

[4] The learned sessions court judge found that the defendant has successfully discharged the burden of proving duress in the execution of the indemnity and that the plaintiff has failed to call Latif, thereby invoking s 114(g) of the Evidence Act 1950 to raise an adverse inference against the plaintiff. In the circumstances, the defence of duress was upheld by the court below.

COUNSEL'S SUBMISSIONS AND DECISION BY COURT

Burden of proof

[5] The learned sessions court judge and the respective learned counsel are of the same view that the burden of proof is cast upon the defendant to establish the defence of duress: ss 102 and 103 of the Evidence Act 1950. However, the dispute here is whether the defendant has discharged this burden.

[6] It was contended by En Shaari Nor, learned counsel for the defendant, that the defendant has successfully discharged the burden notwithstanding that Latif was not called by the defendant and that the plaintiffs failure to call Latif as a witness would attract the application of s 114(g) of the Evidence Act 1950.

[7] Mr LK Tiu, the plaintiff's learned counsel, responded that s 114(g) should be invoked against the defendant who has failed to call Latif as a witness.

[8] In my judgment, notwithstanding s 114(g) relied upon by the respective counsel, it is important to look at s 134 of the Evidence Act 1950 which provides that no particular number of witnesses shall in any case be required for the proof of any fact, in line with the well recognized maxim that 'evidence has to be weighed and not counted'; see p 710 of *Evidence, Practice and Procedure* by Augustine Paul J (now JCA).

[9] Having said that, in my view, the issue is: has the court below correctly applied the law of economic duress to the specific facts as alluded to above, having regard to ss 15 and 73 of the Contracts Act 1950.

Defence of duress

[10] Duress is a concept of English common law.

[11] In Malaysia, our law of contract has been codified in the Contracts Act 1950 which did not specifically provide for duress as a defence. Section 15 thereof however incorporates the concept of coercion as a factor vitiating free consent which is essential in the formation of a legally binding and valid contract. Section 15 defines 'coercion' as 'the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.'

[12] Apparently, the learned sessions court judge in his grounds of decision, specifically at p 66 of the appeal record, construed s 15 as including economic duress and applied it to the aforesaid facts of the case to conclude that the indemnity was thereby vitiated, on the basis of *Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors* [1996] 4 MLJ 331; *The Law of Contract In Malaysia And Singapore, Cases and Commentary* (2nd Ed) 253 et seq by Visu Sinnadurai J (as he then was); and *Schanka v Employment National (Administration) Pty Ltd and others* [2000] 170 ALR 42.

[13] At this juncture, it is appropriate for me to state that although s 15 does not provide for duress as a defence, in Malaysia the concept of duress and that of coercion have been used interchangeably. I shall therefore treat them as such here.

[14] In my judgment, the facts of the case obviously do not come within the ambit and purview of 'coercion' as defined in s 15 as there was no evidence of any committing or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, with the intention of causing any person to enter into an agreement. At p 516,*Cheshire, Fifoot and Furmston's Law of Contract* (2nd Singapore and Malaysian Ed) the learned author, Andrew Phang opined that the concept of economic duress is not encompassed within s 15.

[15] In *Teck Guan Trading*, the plaintiff agreed to sell round bars to the first defendant, Hydrotek Engineering the payment for which was guaranteed by the third and the fourth defendants. The price of the bars was disputed by the parties, viz RM1,180 according to the defendants and RM1,244 as the plaintiff has alleged. Although the first defendant refused to pay the price at RM1,244, the first defendant later agreed as the plaintiff persistently refused to supply. The bars were delivered which the first defendant accepted. The plaintiff sent a notice of demand as a result of the defendants' failure to pay for the balance of payment for the bars. Before the registrar, plaintiff obtained summary judgment against the defendants whose counterclaim was also struck out. The defendants appealed against the decision, alleging that on the facts, there was an inference of, inter alia, coercion with reference to 'economic blackmail'.

[16] Ian Chin J held that s 15 defined only two ways of committing coercion and on the facts concluded that there was no question of coercion being committed on the first defendant. The learned judge added that the contention of 'economic blackmail' as 'economic duress' under English law was not applicable as the parties were dealing with each other at arm's length, following

the doctrine of economic duress in English law as stated by Lord Scarman of the Privy Council in *Pao On & Ors v Lau Yiu Long & Ors* [1980] AC 614, in the following words:

> Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J in *Occidental Worldwide Investment Corporation v Stobs A/S Avanti* [1976] 1 Lloyd's Rep 293 at p 336 that in a contractual situation commercial pressure is not enough. There must be present some factor 'which could in law be regarded as a coercion of his will so as to vitiate his consent.' This conception is in line with what was said in this Board's decision in *Barton v Armstrong* [1976] AC 104 at p 121 by Lord Wilberforce and Lord Simon of Glaisdale — observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognized in *Maskell v Homer* [1915] 3 KB 106, relevant in determining whether he acted voluntarily or not.

[17] The above judgment of Ian Chin J read together with *Pao On*, do not seem to support the respondent's contention based on 'economic duress'.

[18] In *Perlis Plantation Berhad v Mohamad Abdullah Ang* [1988] 1 CLJ 670, duress was raised as a defence. In considering this defence, VC George J (later JCA) held that the defendant should be able to show that his consent to the agreement he had entered into was not free in that such consent was caused by coercion as defined by s 15 and that our Contracts Act 1950 did not provide for any other form of coercion other than as defined by s 15.

[19] Duress was one of the defences raised in *Pamaron Holdings Sdn Bhd v Ganda Holdings Bhd* [1988] 3 MLJ 346 in order to avoid a written sale and purchase agreement of shares, but the exact acts of duress were not divulged. In any event, the alleged duress which was said to have been applied prior to the agreement was subsequently completed without any protest, as a result of which VC George J (later JCA) held, inter alia, that this did not show that the duress defence was made bona fide and hence lacking in merit in that it can be said to be frivolous and vexatious. No reference was made to any provisions of the Contracts Act 1950.

[20] In *Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal* [1992] 2 MLJ 734 (SC), in the court of first instance, the learned judge found that the first debenture was void as it was signed as a result of economic duress within the meaning of *Pao On*, and *A Zee Lobb (Garages) Ltd & Ors v Total Oil GB Ltd* [1983] 1 All ER 944. On appeal, the Supreme Court through the judgment of Edgar Joseph Jr SCJ (as he then was) held that the first debenture was not void but voidable, at the instance of the developer and not the contractor who was not a party thereto. However, no provision in the Contracts Act 1950 had been referred to.

[21] The defence of duress was pleaded in *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd* [1993] 2 MLJ 224 (SC), but there was no evidence to support the defence. Hence, the trial judge and the Supreme Court made a concurrent finding rejecting the defence of duress. However s 15 was not referred to.

[22] In *Mohd Fariq Subramaniam v Naza Motor Trading Sdn Bhd* [1998] 6 MLJ 193 (HC), the plaintiff explained that if he did not sign P3 which was a variation to the agreement for operation of taxis, the defendant would not have released the taxi to him, thereby depriving the plaintiff of his livelihood. James Foong J held that the plaintiff made no protest of any form or manner either before or after P3 was executed that he was coerced into executing it, as a result of which the defence of economic duress was not sustained. The learned Judge followed the judgment of the Singapore Court of Appeal in *Third World Development Ltd and Anor v Atang Latief and Anor* [1990] 1 MLJ 385 (CA) Singapore which in turn referred to *Pao On*, and held that assuming that there was some pressure — commercial pressure — exerted on the appellant at the time of his execution of the undertaking, such pressure does not constitute economic duress unless it amounts to a coercion of his will which vitiates consent. However s 15 was also not referred to in *Mohd Rafiq*.

[23] Sections 15 and 73 were specifically considered by Eusoff Chin J (later Chief Justice Malaysia) in *Chin Nam Bee Development Sdn Bhd v Tai Kim Choo & 4 Ors* [1988] 2 MLJ 117 (HC). The dispute related to the payment of an additional sum of RM4,000 by each of the respondents (the plaintiffs in the magistrate's court) to the appellant (the defendant) pursuant to a sale and purchase agreement to purchase a house each at RM29,500. The magistrate found that the payment was not voluntary but made under a threat by the appellant to cancel the respondents' booking for their houses. There was a protest by the respondents over the payment. The magistrate ordered the refund of the RM4,000 to the respondents and on appeal the order was affirmed by Eusoff Chin J (later Chief Justice Malaysia) who applied ss 15 and 73 of the Contracts Act 1950. The eminent and learned judge rejected the appellant's contention that the threat to cancel the bookings of the houses did not amount to coercion as defined under s 15. His Lordship further considered s 73 which, where relevant, reads as follows:

> 73 A person to whom money has been paid under coercion, must repay or return it.

[24] His Lordship followed the Privy Council decision in *Kanhaya Lai v National Bank of India Ltd* [1913] ILR Vol XL (Calcutta series) 598 and held that the word 'coercion' in the context of s 73 should be given its ordinary and general meaning, while the definition of coercion in s 15 should only apply for the purpose contained in s 14 which regulates free consent.

[25] From all the aforesaid authorities in which the concept of duress, including economic duress, has been enunciated, the following principles may be culled:

1 Our courts are slow in invoking the concept of duress as defined in s 15 or to import the concept of economic duress unless there is positive evidence

to that effect, which must satisfy the guidelines given by the Privy Council in *Pao On*.

2 The defence of duress or economic duress must be such as to vitiate free consent in order to render a contract voidable.

3 The concept of coercion as defined in s 15 cannot be equated with that in s 73 in which the word 'coercion' should be given an ordinary and general meaning.

4 Section 73 requires a person to whom money has been paid under coercion to repay or return it.

[26] On the facts as specifically found by the court below, there is nothing to indicate that the defendant established any of the guidelines given in *Pao On*. The words purportedly said by Latif, even if accepted in toto, cannot constitute economic duress to render the indemnity voidable.

[27] There was no allegation by the defendant that his payment of the original deposit of RM65,000 to the plaintiff was paid pursuant to the exertion of any economic duress by the plaintiff. Hence, the facts do not attract the application of s 73.

CONCLUSION

[28] On the foregoing grounds, I hold that the decision of the sessions court could not be upheld and is hereby set aside. The appeal is hereby allowed and the plaintiffs claim is allowed with costs.

Appeal allowed with costs and decision of the sessions court set aside.

Reported by Eugene Jayaraj